Katie M. Brown
Counsel

Duke Energy
40 W. Broad Street
Suite 690
Greenville, SC 29601

o: 864.370.5296
f: 864.370.5183
katie.brown2@duke-energy.com

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VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk and Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters
Docket No. 2021-291-A

Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC

Dear Ms. Boyd:

Pursuant to Directive Order No. 2021-736 issued in the above-referenced docket, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together "the Companies") respectfully submit the following comments on substance, procedure, and timelines for pre-filed rebuttal and surrebuttal testimony. The Companies appreciate the opportunity to provide input in this process.

Background and Introduction

The South Carolina Constitution commands the General Assembly to "provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest." S.C. CONST. art. IX, § 1. In fulfilling its constitutional responsibility, the General Assembly has designated the Commission as "the 'expert' . . . to make policy determinations regarding utility rates." *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 371, 692 S.E.2d 910, 916 (2010) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986)); *see also* S.C. Code Ann. § 58-3-140(A) (providing "the commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State").

To carry out its role, the General Assembly requires the Commission to "promulgate regulations to require the direct testimony of witnesses appearing on behalf of utilities and of witnesses appearing on behalf of persons having formal intervenor status, such testimony to be

reduced to writing and prefiled with the commission in advance of any hearing." S.C. Code Ann. § 58-3-140(D). Indeed, this requirement is delineated in the statute that goes to the very "powers of the Commission to regulate public utilities." *Id.*; *cf. McInnis v. McInnis*, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (stating "the title and headings of a statute" can "shed light on" its meaning). For its part, the Commission has promulgated a number of regulations governing practice and procedure in utility matters. *See* S.C. Code Ann. Regs. 103-800–59. In doing so, the Commission must ensure that its procedures comply with the specific due process concerns applicable to proceedings before administrative agencies. *See* S.C. CONST. Art. I, § 22.

When a utility files an application or petition, it often includes pre-filed direct testimony. *E.g.*, Application and Direct Testimony, Docket No. 2018-318-E (Nov. 8, 2018); Application and Direct Testimony, Docket No. 2018-319-E (Nov. 8, 2018). "In proceedings involving utilities, the Commission shall require any party and the Office of Regulatory Staff to file copies of testimony and exhibits and serve them on all other parties of record within a specified time in advance of the hearing." S.C. Code Ann. Regs. 103-845(C). The Commission then provides the utility the opportunity to pre-file rebuttal testimony. In the Commission's sole discretion, intervenors may pre-file surrebuttal testimony. *See Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 439, 319 S.E.2d 695, 700 (1984).

Against this backdrop, as cases have become increasingly more complex and heavily litigated, it is worth evaluating whether changes or clarifications to the Commission's process for accepting pre-filed testimony could provide more predictability and efficiency in Commission proceedings while ensuring procedural fairness and due process for all parties. In response to the Commission's Directive No. 2021-736 in Docket No. 2021-291-A (Nov. 3, 2021), the Companies are pleased to offer the following comments and recommendations on procedure, substance requirements, and timelines for pre-filed testimony and exhibits.

First, the Commission should retain its current practice of requiring parties to pre-file rebuttal testimony. Given the complex issues litigated before the Commission, allowing only live testimony or cross-examination for rebuttal would result in a more inefficient process, run afoul of S.C. Code Ann. Regs 103-845(C), and potentially create serious due process concerns. Second, the Commission should discontinue its recent practice of making surrebuttal testimony available in all cases. Surrebuttal testimony should be permitted only in cases in which the party with the burden of proof raises new matters in rebuttal testimony. Third, the Commission should preserve the option of bifurcating direct and rebuttal testimony. Because the utility bears the burden of proof, the Commission should continue providing the utility with the flexibility to bifurcate witnesses as needed. Fourth, if the Commission wishes to change the current testimony filing requirements, it should initiate a rulemaking under the Administrative Procedures Act because doing so, without a rulemaking, would contravene S.C. Code Ann. Regs. 103-845(C). The Companies believe that adopting these recommendations would enhance procedural fairness for the applicant/petitioner, result in procedural clarity and hearing efficiencies, and better align South Carolina practice with many other jurisdictions across the country.

Importance of Pre-Filed Direct Testimony

The Companies routinely file substantively robust applications and pre-filed direct testimony and recommend that the practices and procedures regarding the filing of pre-filed direct testimony remain unaltered. As one scholar has recognized, "[d]espite all the drama around cross-examination, the core of any party's case is its pre-filed testimony. It is the main evidence on which a party relies to advance its position, the main target against which the opponents launch their attacks, and the main source of material—the facts, insights[,] and judgments—that supports the agency's opinion." Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, 36 ENERGY L. J. 15–16 (2015). Fundamentally, contested cases before the Commission come down to a battle of the experts. Pre-filed testimony is thus important because it helps expedite cases by streamlining direct examination, obviating the need for depositions, and potentially narrowing disputed issues before the Commission. And it has important underpinnings of procedural fairness. *See* S.C. CONST. art. I, § 22. In fact, as the Commission has long recognized, the purpose of pre-filing testimony is to provide notice of the issues, afford procedural fairness to all parties, and allow for a more orderly and efficient hearing. *E.g.*, Order No. 1996-629, Docket No. 1996-259-WS, at 2 (Sept. 10, 1996); Order No. 80-1995, Docket No. 79-300-E, at 3 (Apr. 8, 1980).

Pre-filed testimony also serves to meet an applicant's burden of proof. Under longstanding principles of evidentiary and administrative law, the party asserting the affirmative of an issue has the burden of proof. However, making a prima facie showing is not a heavy burden. *Mack v. Branch No. 12, Post Exch., Fort Jackson*, 207 S.C. 258, 272, 35 S.E.2d 838, 844 (1945) ("Prima facie is a Latin phrase and literally means at first view; on the first appearance. Prima facie evidence of fact is in law sufficient to establish the fact, unless rebutted. The words import that the evidence produces for the time being a certain result; but that result may be repelled." (internal quotation marks and citations omitted)). The only requirements for establishing a prima facie case for a rate case application, for example, are meeting statutory requirements and regulatory requirements, such as those set forth in S.C. Code Ann. Regs. 103-823. *See, e.g.*, *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 108, 708 S.E.2d 755, 762 (2011) ("The information an applicant must provide in support of its proposed rate increase is set forth by regulation."). [1] Despite the presumption of reasonableness, the Companies routinely file hundreds of pages in support of material requests. Once a prima facie case is made, the utility has met its burden of proof unless challenged with specificity. *See, e.g.*, *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992) ("Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence.").

[1] If the Commission promulgates rules on minimum filing requirements, as currently contemplated in Docket No. 2020-247-A (*Public Service Commission Review of South Carolina Code of Regulations Chapter 103 Pursuant to S.C. Code Ann. Section 1-23-120(J)*), that could impact the requirements of what a prima facie case looks like. However, until such a rule is promulgated and approved, the current process is lawful and appropriate given that there is no way to know in advance which issues may pique a Commissioner's or party's interest and require more information.

Discovery on those filings is robust, and the Companies frequently answer hundreds and sometimes thousands of questions in discovery.[2]

Importance of Pre-Filed Rebuttal Testimony

Where the Companies' pre-filed testimony, or responses to discovery, raise issues of dispute, intervenors and the Office of Regulatory Staff ("ORS") have an opportunity to challenge the Companies' requests in their own pre-filed direct testimony. As required by law, the Companies have the opportunity to respond to such challenges, and given the technical nature of utility cases, it is logical and procedurally efficient to have such response take the shape of pre-filed rebuttal testimony—which parties can issue discovery on to use in cross-examination at hearing. The Companies have been unable to identify any other state utility commission where prefiling rebuttal testimony is not, at a minimum, an expectation, if not a requirement.

With that in mind, the Companies believe it is important to continue to allow the applicant or petitioner the ability to pre-file written rebuttal testimony with the Commission. Allowing only live testimony or cross-examination for rebuttal—particularly on the complex and highly technical issues litigated before the Commission—would not only create a more inefficient process but also would run afoul of S.C. Code Ann. Regs. 103-845(C). Pre-filed rebuttal testimony helps narrow and highlight the central litigated issues before the Commission prior to a hearing. From the Companies' perspective, pre-filed rebuttal is the Companies' best and most efficient opportunity to address and clarify issues raised by intervenors' direct testimony. Contested cases, especially rate cases, are complicated and require sufficient time to evaluate parties' positions, conduct discovery, correct errors, develop exhibits, and properly prepare for a hearing. The point of these proceedings is to provide the Commission with all the information needed to reach an informed decision based on the evidentiary record. As issues before the Commission are often complex, limiting rebuttal to oral cross-examination would likely result in longer hearings as parties attempt to address complicated issues solely on the stand. Further, limiting rebuttal to cross-examination could reward procedural posturing and lead to a trial by ambush. *Cf. CEL Prod., LLC v. Rozelle*, 357 S.C. 125, 132, 591 S.E.2d 643, 646 (Ct. App. 2004) ("The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." (quoting *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003))). This practice would also be an inefficient use of both the parties' and the Commission's time and resources.

Surrebuttal Testimony as a Matter of Right

South Carolina is alone in routinely scheduling surrebuttal testimony as part of the procedural schedule of a matter, and the Companies have been unable to identify any other state utility commission that routinely permits the pre-filing of surrebuttal testimony. This Commission has noted that surrebuttal testimony is discretionary and should be limited in scope, yet current

[2] The Companies also recommend establishing discovery deadlines in the Commission's procedural schedule. This would promote procedural efficiency and discourage parties from delaying discovery until right before hearings, thereby obfuscating an applicant's ability to respond to discovery and prepare for hearings.

practice before the Commission generally allows for surrebuttal in all cases, in contravention of South Carolina case law and prior Commission orders. *See, e.g.*, *Palmetto All., Inc.*, 282 S.C. at 439, 319 S.E.2d at 700; Order No. 2021-357, Docket No. 2005-83-A, at 1–2 (May 18, 2021) (noting "the opportunity to present surrebuttal testimony is discretionary with the Commission"); Order No. 2020-431, Docket No. 2019-281-S, at 3–4 (July 6, 2020) (stating "the filing of surrebuttal testimony is discretionary with the Commission" and "hold[ing] that no filing of surrebuttal testimony be allowed"); *but see* Notice of Hearing and Prefile Testimony Deadlines, Docket No. 2021-1-E (Dec. 14, 2020) (setting deadline for surrebuttal testimony in a procedural order). Allowing surrebuttal testimony in all cases unnecessarily takes up time in the hearing calendar as well as the overall procedural calendar.

In the Companies' view, permitting surrebuttal testimony in *every* case is inconsistent not only with any utility commission practice that the Companies could find, but also with the evidentiary principle that the party with the burden of proof has the right to open and close the presentation of evidence. *See State v. Beaty*, 423 S.C. 26, 39, 813 S.E.2d 502, 509 (2018) ("Rule 43(j), SCRCP, controls the content and order of argument in civil cases. This rule essentially provides that the plaintiff shall have the right to open and close at the trial of the case and must open in full, and in reply may respond in full but may not introduce any new matter."). Indeed, surrebuttal is not the norm in civil practice. It is only appropriate in cases in which the party with the burden of proof raises new matters in its rebuttal testimony. *See Camlin v. Bi-Lo, Inc.*, 311 S.C. 197, 200, 428 S.E.2d 6, 7 (Ct. App. 1993) (per curiam) ("A defendant has a right to respond to new evidence given in reply. Because [plaintiff] did not introduce new matter, the court had discretion to refuse evidence in response."); *see also United State v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) ("Surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal.").

Further, giving parties an opportunity to introduce new evidence without allowing the party with the burden of proof adequate time to file a motion, conduct discovery, or offer its own rebuttal evidence is fundamentally unfair. This practice conflicts with fundamental principles of due process as articulated in South Carolina case law, which requires that utilities be given a meaningful opportunity to respond to evidence. *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011). The party with the burden of proof "has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses." *Daniel v. Tower Trucking Co. Inc.*, 205 S.C. 333, 351, 32 S.E.2d 5, 10 (1944). Universally available surrebuttal testimony conflicts with these clearly articulated requirements. *Cf.* S.C. Code Ann. Regs. 103-846 ("The rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed.").

Additionally, procedural challenges and inefficiencies often arise in the context of the timing of pre-filed surrebuttal testimony. For example, when the deadline for filing surrebuttal testimony is less than 10 days before a hearing, it is impossible to file a written motion or issue discovery in compliance with the Commission's regulations. *See* S.C. Code Ann. Regs. 103-829 & -833. Rules setting deadlines like 103-829 (Motions) and 103-833 (Written Interrogatories and Request for Production of Documents and Things) become meaningless when procedural schedules allow for testimony, such as surrebuttal, to be filed less than ten days prior to the start of a hearing. As a result, instead of focusing on preparing for the hearing to provide the most

helpful information to the Commission, the Companies are forced to divert their efforts to filing motions to strike, which are prejudicial at that point. Given that motions are often heard at the start of an evidentiary hearing, neither the parties nor the Commission have the time or forewarning to appropriately consider the merits of the motion being presented. *E.g.*, Notice of Hearing and Prefile Testimony Deadlines, Docket No. 2021-1-E (Dec. 14, 2020) (setting surrebuttal testimony deadline two days before the date of the hearing). The non-moving party has almost no opportunity to prepare a response or defense. Further, the parties lack meaningful access to the testimony to prepare for Commission questions or conduct cross-examination. Presumably, the Commission would want all relevant filings in advance of a hearing to prepare its own questions. *See* S.C. Code Ann. § 58-3-140(D). Regardless, depending on the nature of what is presented in surrebuttal, this procedure is fundamentally unfair and can result in a denial of due process.

Comparison to Other Jurisdictions

By way of comparison, in the other jurisdictions where the Companies operate, surrebuttal testimony is not routinely available in all cases. Instead, the commissions have the discretion to permit surrebuttal testimony on a case-by-case basis, a practice which is consistent with South Carolina case law but inconsistent with this Commission's current practice. *See, e.g.*, NCUC Order Adopting Final Rules, Docket No. E-100, Sub 113, at 6 (Feb. 29, 2008) ("The utilities have the burden of proof in fuel charge adjustment cases and, for that reason, have the right, as a general rule, to present the closing evidence in rebuttal. The Commission does, however, have the discretion, on a case-by-case basis, to allow surrebuttal testimony based upon a showing of good cause."); *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TP-ACO, 2005 Ohio PUC LEXIS 317, at *10 (Ohio P.U.C., June 14, 2005) ("Although not definitively committing to the filing of intervenor surrebuttal testimony, the Commission calls attention to the fact that any intervenor may file a motion for leave to file such testimony at the appropriate time."); *Louisville Gas and Elec Co.*, Case No. 2002-00232, at 2 (Ky. PSC Nov. 22, 2002); Order Denying Motion to Strike, Request for Continuance of Hearing, Request to file Surrebuttal Testimony, and Request to Impose Sanctions, Order No. PSC-00-2340-PCO-TP, Docket No. 000084-TP (Fla. PSC, Dec. 6, 2000) (denying request to file surrebuttal testimony); *cf.* Joint Intervenors' Motion to Strike, *Petition of Indianapolis Power & Light Co.*, Case No. 45029, at 3–4 (Ind. URC July 6, 2018) (noting "intervenors no longer have an opportunity to respond through pre-filed testimony" and requesting leave "to file limited surrebuttal testimony addressing . . . new arguments" raised in rebuttal).

A review of our neighboring states' treatment of surrebuttal is also instructive. In Alabama, Georgia, and Tennessee, for example, surrebuttal testimony is not common practice. *E.g.*, Resp. in Opp. to Mot. to Strike Rebuttal Testimony, *Petition of CenturyTel of Alabama, LLC*, Docket No. 29075, at 2 (Ala. PSC Dec. 10, 2003) (stating that "typically, summaries of the written testimony are given by witnesses and the summaries, themselves, serve as rebuttal for the intervenors' direct testimony and surrebuttal for the petitioner's testimony"); Procedural and Scheduling Order, *Capacity and Energy Payments to Cogenerators Under PURPA*, Docket Nos. 4822, 16573, and 19279, at 4–5 (Ga. PSC Aug. 18, 2020) (setting a deadline by which parties may file limited surrebuttal testimony); Order Establishing Procedural Schedule, *In re Petition of*

Piedmont Natural Gas Co., Inc., Docket No. 20-00086, at 1–3 (Tenn. PUC Aug. 25, 2020) (allowing only for pre-filed rebuttal testimony and not mentioning surrebuttal testimony).

Flexibility to Separate Direct and Rebuttal Testimony

As mentioned previously, as the applicant or petitioner, the utility bears the burden of proving its case-in-chief. That said, utility costs are presumed reasonable and prudent until challenged. *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 112. At that point, the utility has the "burden of production." *Id.* Given this construct, it is important for the Companies to retain the flexibility to separate direct testimony and rebuttal testimony. In its direct case, the utility supports its application or petition with the requisite information to satisfy S.C. Code Ann. Regs. 103-823 or -825. However, the utility does not know what elements of its application or petition are being challenged until a party challenges a specific item. The utility then provides additional information, through pre-filed rebuttal testimony, to further demonstrate why the utility's application or petition should be approved. To require otherwise would force the applicant or petitioner to predict what particular issues various intervenors will raise and reflect that in direct testimony. The Companies believe such a practice would be inefficient and inconsistent with the requirements of a prima facie case, as previously described.

The Companies do understand that there are times where it is more efficient for a witness to take the stand once, and endeavor to take advantage of those efficiencies, when feasible. However, for some issues, it is prejudicial for a witness to have to make the very points they are rebutting in order for the witness's testimony to have appropriate context before the Commission. Because the utility shoulders the burden of proof, the Commission should continue providing the utility with the flexibility to bifurcate witnesses between direct and rebuttal—as needed—to ensure each issue receives the appropriate time and treatment.

Further, the practice of open cross-examination often solicits new direct testimony if the question seeks information outside the scope of the pre-filed testimony, or the witness's expertise. This happens not only with cross-examination but Commission questions as well. As a result, if the parties do not appear in the phase of the case in the same cadence in which testimony is filed, then a party may not have the opportunity to receive the same question from a Commissioner or respond to the new direct testimony. In the Companies' view, this inefficiency could be mitigated or eliminated entirely by hearing testimony in the order in which it was filed. For example, Georgia routinely allows rebuttal testimony to be heard after the testimony the utility is rebutting. *See, e.g.*, Procedural and Scheduling Order, *In re Georgia Power Company's 2019 Rate Case*, Docket No. 42516, at 3-4 (Ga. PSC May 24, 2019) (Establishing procedure through which Georgia Power may file rebuttal testimony in response to intervenor direct testimony); Procedural and Scheduling Order, *In re Georgia Power Company's 2019 Integrated Resource Plan*, Docket No. 42310, at 3-4 (Ga. PSC Feb. 5, 2019) (Setting separate deadlines for Georgia Power Company's direct testimony, intervenor testimony, Georgia Power Company's rebuttal testimony); Procedural and Scheduling Order, *In re Georgia Power Company's 2016 Integrated Resource Plan*, Docket No. 40161, at 3-4 (Ga. PSC Feb. 19. 2016).

Necessity of Rulemaking

"Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" *Joseph v. S.C. Dep't of Labor, Licensing & Reg.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016) (quoting *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)). As the Supreme Court of South Carolina has held, "the 'key inquiry' is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case." *Id.* (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 491, 636 S.E.2d 598, 618 (2006) (Toal, C.J., dissenting)). So "long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." *Id.* (quoting *Sloan*, 370 S.C. at 491, 636 S.E.2d at 618 (Toal, C.J., dissenting)). But "when there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA." *Home Health Serv., Inc.*, 312 S.C. at 329, 440 S.E.2d at 378.

Here, if the Commission wishes to change current filing requirements, it should engage in rulemaking under the Administrative Procedures Act because doing so, without a rulemaking, would contravene S.C. Code Ann. Regs 103-845(C). Even then, the Companies would suggest that such a sea change in practice before the Commission would be inconsistent with legislative intent. *See* S.C. Code Ann. § 58-3-140(D).

Likewise, as our Supreme Court has recognized, "[t]he opportunity to present surrebuttal evidence is discretionary with the Commission." *Palmetto All., Inc.*, 282 S.C. at 439, 319 S.E.2d at 700. Surrebuttal as a regular practice is outside the norms of other utility commissions and South Carolina law, as described above.

Conclusion

In summary, the Companies offer several specific recommendations for the Commission's consideration. First, the Companies recommend that the Commission retain its current practice of requiring parties to pre-file rebuttal testimony. Given the complex and highly technical issues litigated before the Commission, allowing only live testimony or cross-examination for rebuttal would not only create a more inefficient process but also would run afoul of S.C. Code Ann. Regs. 103-845(C). Further, it could create serious due process concerns. Pre-filed rebuttal testimony helps narrow and highlight the central litigated issues before the Commission prior to a hearing, and from the Companies' perspective, pre-filed rebuttal is the Companies' best and most efficient opportunity to address and clarify issues raised by intervenors' direct testimony. The Companies agree with the comments filed by the South Carolina Water Utilities, Inc. in this regard that "[p]re-filed rebuttal is especially critical to the orderly adjudication of rate cases because it provides the utility the opportunity to respond to ORS's, or other parties', accounting adjustments." SCWU Letter and Comments, Docket No. 2021-291-A, at 1 (Nov. 16, 2021).

Second, the Commission should discontinue its recent practice of making surrebuttal testimony available in all cases. *Cf. Palmetto All., Inc.*, 282 S.C. at 439, 319 S.E.2d at 700 ("The opportunity to present surrebuttal evidence is discretionary with the Commission."). Permitting

surrebuttal testimony in *every* case is inconsistent not only with any utility commission practice that the Companies could find, but also with the evidentiary principle that the party with the burden of proof has the right to open and close the presentation of evidence. Surrebuttal testimony should be permitted only in cases in which the party with the burden of proof raises new matters in its rebuttal testimony. Whether pre-filed surrebuttal testimony is necessary should turn on the facts of each case, as well as the filings presented in the docket, and take into account issues of timing and procedural fairness. It should be the exception, not the rule.

Third, the Commission should preserve the option of bifurcating direct and rebuttal testimony. As the applicant or petitioner in a proceeding, the utility bears the burden of proving its case-in-chief. However, utility costs are presumed reasonable and prudent until they are challenged, at which point the utility has the burden of production. Given this construct, it is crucial for the Companies to retain the flexibility needed to bifurcate witnesses between direct and rebuttal testimony as needed to ensure each issue is sufficiently addressed.

Finally, if the Commission wishes to change the current testimony filing requirements, it should engage in a rulemaking under the Administrative Procedures Act because doing so, without a rulemaking, would contravene S.C. Code Ann. Regs. 103-845(C).

* * * *

The Companies sincerely appreciate the opportunity to offer comments and would be happy to assist the Commission in any way as it continues to consider these matters of practice and procedure.

Sincerely,

Katie M Brown

Katie M. Brown

cc: Parties of Record (via email)